COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Consolidated Arbitrations	D.P.U./D.T.E. 96-73/74, 96-75, 96-80/81, 96-83, 96-94
Performance Assurance Plan	D.T.E. 03-50

AT&T's REPLY COMMENTS ON CONSIDERED ELIMINATION OF CONSOLIDATED ARBITRATIONS PERFORMANCE STANDARDS

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Introduction

AT&T Communications of New England, Inc. ("AT&T") submits this reply to Verizon's January 25, 2005 filing ("Verizon January 25 Comments"). AT&T's position on the Department's questions in its December 8, 2004 Memorandum to the parties is set forth in AT&T's initial comments filed on January 25, 2005. We have limited our comments here to only the arguments and issues raised by the Verizon January 25 Comments. AT&T reserves its right to seek leave for further filings if Verizon's reply comments raise issues not previously addressed by AT&T.

In these reply comments, AT&T continues to urge the Department not to take the precipitous action of eliminating CLEC contract rights, and certainly not on the current "record." As we have demonstrated and further demonstrate below, a Department order purporting to modify existing contract rights, especially on the factual basis proposed but not demonstrated, would violate the Telecommunications Act of 1996 and would violate both federal and state constitutions.

I. *Is the Department precluded from eliminating the Consolidated Arbitrations performance standards from interconnection agreements by a decision in this docket, or is the Department required to conduct an arbitration or engage in some other procedure for purposes of determining whether to eliminate the Consolidated Arbitrations performance standards from interconnection agreements*?

In response to this question, Verizon makes essentially two arguments in its January 25 Comments. Both are predicated on Verizon's version of the scriptures: he (or she) who giveth may taketh. According to Verizon, the Department can take away the metrics and penalties it previously ordered because, when it established those metrics and penalties in Phase 3-B of the *Consolidated Arbitrations*, it said it would consider changes based on experience. Verizon January 25 Comments, at 2-3, citing *Consolidated*

Arbitrations, Phase 3- B Order, at 34. Verizon also argues that *Pacific Bell* is no obstacle, because *Pacific Bell* applies only to negotiated terms of an interconnection agreement, not ordered terms. Verizon January 25 Comments, at 3. Verizon is wrong on both counts.

A. THE DEPARTMENT'S PHASE 3-B ORDER ESTABLISHES A PRESUMPTION THAT THE *CONSOLIDATED ARBITRATIONS* METRICS WILL ***NOT*** CHANGE UNLESS A PARTY CAN MEET THE HEAVY BURDEN OF SHOWING COMPELLING REASONS WHY SUCH CHANGE IS NECESSARY.

Although Verizon correctly identified language in the Department's Phase 3-B Order indicating the possibility that the Department would consider changes to the metrics in the *Consolidated Arbitrations*, Verizon conveniently omitted the standard that the Department established before such a change could be made. The Department stated:

> To be clear, we also adopt NYNEX's proposal that it report data on both the measures that are subject to performance payments and the ones that it has proposed to be presented for informational purposes. If, after at least six months of experience, there is an indication that more or fewer measures are necessary to support the parity standard, either as informational items or as measures subject to performance payments, parties may petition the Department to that effect. *However, the Department will only consider changes to the standards adopted here if parties can show* ***compelling*** *reason why such changes are necessary*.

Phase 3-B Order, at 34 (emphasis supplied).

There are several aspects of the Department's language worth noting. First, the Department imposed the burden on a *party.* Second, the Department required that a party present a *compelling* reason; and, third, the Department required that the reason demonstrate that the change is *necessary.* In addition, this standard was put in place for purposes of considering "more or fewer measures . . . necessary to support the parity standard[.]" In the instant case, Verizon does not come close to satisfying the standard

for effecting a change to the performance metrics that the Department established, much less the wholesale elimination of the *Consolidated Arbitrations* metrics.

Verizon argument boils down to a claim that the two different sets of metrics are duplicative, that the PAP metrics are better because they are updated and "more comprehensive" and that, as a result, "[n]o public policy is advance [sic] by requiring that Verizon MA continue to report its performance under two plans – one of which (the PAP) is comprehensive and state-of-the-art while the other is stale." Verizon February 12, 2004, Filing, at 10. Such a claim is hardly compelling when Verizon offers no reason or evidence why the Department should now consider "duplicative" and "unnecessary" – ***an arrangement that Verizon itself proposed as appropriate and in the public interest.*** S*ee*, D.T.E. 99-271 (Sept. 5, 2000), at 29. Although Verizon argues that "the Department can reassess the efficacy of [the *Consolidated Arbitrations*] plan in light of current circumstances . . . " (Verizon January 25 Comments, at 3), Verizon never explains what it is about the circumstances today that is different from the circumstances present when Verizon proposed and the Department approved a PAP plan intended to work in tandem with the *Consolidated Arbitrations* plan. D.T.E. 99-271 (Sept. 5, 2000), at 30.

In any event, Verizon's vague and general assertions do not present a compelling reason why more or fewer measures are necessary to support the parity standard[.]" Phase 3-B Order, at 34. Rather than presenting a compelling reason why a change is necessary, Verizon makes general claims that the PAP metrics are "more comprehensive" and are "updated" without connecting such claims to real world results. For example, what does it mean for the PAP metrics to be more "comprehensive" when – for AT&T over a recent nine month period – they produced a lower level of penalty payments than

the *Consolidated Arbitration* metrics in well over half the months? Moreover, Verizon provides no evidence regarding which of its performance failures will be penalized less severely and why such reduction in anticompetitive disincentives will likely have no effect on Verizon's performance in meeting the "parity standard," if the *Consolidated Arbitration* metrics are eliminated. Such information is necessary before it is possible to determine what effect the elimination of the *Consolidated Arbitrations* metrics will have Verizon anticompetitive behavior.

The *Consolidated Arbitrations* metrics also serve another important function. Virtually all regulatory rules can be gamed, and any single set of metrics is no exception. The mere existence of a second set of metrics that will kick in if Verizon's payments drop precipitously under the PAP makes Verizon gaming of the PAP metrics less likely. In this sense, the *Consolidated Arbitrations* metrics operate as a kind of "alternative minimum tax." Their existence provides a limitation on the extent of regulatory gaming that Verizon has an incentive to engage in.

In summary, Verizon provides no specific information that would permit the Department to determine that the elimination of the *Consolidated Arbitrations* metrics would ***now*** be in the public interest in light of the PAP performance metrics, when – even according to Verizon – the availability of the *Consolidated Arbitrations* metrics working in tandem with the PAP performance metrics was in the public interest when Verizon wanted the PAP adopted.

B. CONTRARY TO VERIZON'S CLAIMS, *PACIFIC BELL* APPLIES TO THE INSTANT CASE.

In its January 25, 2005, filing, Verizon invents out of whole–cloth the holding of *Pacific Bell*. In a series of statements, Verizon surreptitiously inserts into the description

of the *Pacific Bell* court's decision the term "negotiated" which hardly appears in the Court's decision and is never linked to the *Pacific Bell* court's holding. Verizon states:

> The *Pacific Bell* decision referenced in the Hearing Officer's question does not prevent the Department from changing or eliminating the *Consolidated Arbitrations* plan. In that case, the California commission established a rule relating to reciprocal compensation on Internetbound traffic in a generic proceeding that purportedly overrode the terms of existing *negotiated* interconnection agreements. The 9th Circuit ruled this was impermissible under the Act. The court held that a state agency could not negate the terms of *negotiated* agreements because such action was inconsistent with the limited grant to state commissions under Section 252 of the Act. . . . Here, the Department would not affect any *negotiated* term of an interconnection agreement by eliminating the *Consolidated Arbitrations* plan.

Verizon January 25 Comments, at 3 (emphasis added).

Based on Verizon's argument, one would believe that the *Pacific Bell* court had singled out an action by the CPUC for invalidation precisely because the CPUC's action purported to "negate" *negotiated* terms in an existing interconnection agreement. In fact, nothing in *Pacific Bell* indicates whether the contract terms that the CPUC sought to modify or "interpret" on a generic basis were negotiated or ordered. The *Pacific Bell* court stated:

> By promulgating a generic order binding on existing interconnection agreements without reference to a specific agreement or agreements, the CPUC acted contrary to the Act's requirement that interconnection agreements are binding on the parties, or, at the very least, it acted arbitrarily and capriciously in purporting to interpret "standard" interconnection agreements.

Pacific Bell, 325 F. 3d 1114, 1125-1126. Nothing in the court's decision states that its ruling should apply only to the negotiated terms in a binding interconnection agreement. Moreover, nothing in the facts of the court's decision provides a basis to make such an inference. Rather, the court objected to the CPUC's action "because it effectively changes the terms of 'applicable interconnection agreements' in California, and therefore

contravenes the Act's mandate that interconnection agreements have the binding force of law." *Id*., at 1127. In other words, the court objected to a state commission action that purports to modify *existing* interconnection agreements, which "have the binding force of law."

The Department has ruled (erroneously, in AT&T's view) that its "hands are tied" and that it is preempted by federal law from taking certain unbundling actions to further competition in the local market. D.T.E. 98-57, Phase III-D (Jan. 30, 2004); D.T.E. 03-60/D.T.E. 04-73 (Dec. 15, 2004). It would indeed be problematic if the Department were to find in this case that *Pacific Bell* – which on its face finds that state commission orders purporting to change existing interconnection agreements on a generic basis violate federal law – does not "tie the Department's hands" when the contemplated state action (elimination of Verizon's liquidated damages obligations) would have an anticompetitive effect.

II. *If the Department has authority to eliminate the Consolidated Arbitrations performance standards from interconnection agreements by a decision in this docket, must the Department conduct an adjudicatory hearing, as AT&T contends in its initial and reply comments? . . . If so, what would be the factual issues in dispute and type of evidence to be examined?*

In its January 25, 2005, Filing, Verizon argues that the Department need not conduct an adjudicatory hearing before eliminating CLEC contract rights to liquidated damages because it "has already established the C2C Guidelines and the PAP as appropriate standards for gauging Verizon MA's performance plan from interconnection agreements[.]" Verizon January 25 Comments, at 4. Verizon's argument fails for the reasons detailed below.

First, Verizon does not even attempt to address the issue raised by the Department's question. In this question, the Department asks the parties to address the

issues raised by AT&T in its initial and reply comments filed in 2004. In its 2004 filings, AT&T demonstrated that, under the Administrative Procedures Act, a party has a right to a hearing before the state government may take its constitutionally protected property rights. *See*, AT&T February 12, 2004 Comments, at 6. The mere statement that Verizon makes in its January 25, 2005 filing (that the Department has established C2C Guidelines and the PAP) does not even attempt to address the issue of whether the Administrative Procedures Act requires a hearing before the Deparment can eliminate CLEC contract rights. If, in its reply comments, Verizon addresses this issue for the first time in response to the Department's question, the Department should strike the response or, in the alternative, permit AT&T to respond. AT&T reserves its right to seek such relief from the Department.

Second, Verizon's contention that no further due process protections are required because AT&T was allowed to participate in the establishment of the PAP ignores the fact that the PAP was established as an agreement between the Department and Verizon as means for Verizon to obtain the Department's positive recommendation for the FCC's Section 271 approval. Although the Department took comments from the CLECs, the Department made it clear that CLECs had no due process rights or protections in the outcome:

> [T]he Carrier-to-Carrier Performance Guidelines and the PAP adopted in this Order are not replacements for the *Consolidated Arbitrations* performance standards and credits; therefore, there is no reason to establish an adjudicatory process in order to protect CLECs' due process, contract, and statutory rights, as AT&T contends (see AT&T Motion at 8). Verizon will continue to comply with the requirements of Phase 3 in the *Consolidated Arbitrations*.

D.T.E. 99-271 (September 5, 2000), at 3. Verizon never explains, nor can it, how CLEC due process rights related to their contract rights can now be satisfied by a PAP process that had no due process protections.

Verizon also suggests that AT&T and other CLECs are adequately protected because we can "participate in the New York Carrier Working Group which regularly addresses additions, deletions, and modificaqtions to the performance metrics as well as the PAP." Verizon January 25 Comments, at 4. Verizon argues that CLEC participation in the New York Carrier Working Group is sufficient because the proposal at issue "would simply be [an] eliminati[on of] duplicative measurement schemes and substituting one approved plan for another." *Id*. Verizon, however, conveniently ignores the fact that the proposal to eliminate the *Consolidated Arbitrations* metrics is a proposal to reduce the liquidated damages to which CLECs are entitled, and not just a "substitution" of the type of metrics used. Indeed, as AT&T noted in its January 25, 2005 comments, had Verizon approached AT&T with a proposal to rely on only the PAP metrics, but with an increased PAP penalty payment to offset the elimination of liquidated damages under the *Consolidated Arbitrations* metrics, AT&T may well have found such a proposal acceptable. *See*, AT&T January 25, 2005, Comments, at 4.

Verizon's argument that no due process protections are required must fail because it is based on the erroneous assumption that the Department's proposal involves only a "substitution" of metrics plans with no loss of valuable property rights.

III. *Procedurally, how would Verizon and CLECs implement a Department Decision in this docket eliminating the Consolidated Arbitrations performance standards from their interconnection agreements? Would such a Department decision constitute a change of law requiring revision of these interconnection agreements pursuant to the agreements' change-of-law provisions? Please explain.*

In its January 25, 2005, filing, Verizon argues that the Department can eliminate the *Consolidated Arbitrations* metrics by order in this docket with no subsequent "change of law" proceeding required. Verizon bases its argument on the fact that the interconnection agreements reference the Department's arbitration proceeding. Verizon never explains why a contract provision that expressly identifies the performance metrics ordered by the Department in a specifically identified *arbitration* proceeding would nevertheless be triggered by Department action in a separate docket opened years after the arbitration proceeding was closed.

The interconnection agreements mentioned by Verizon do not incorporate by reference any action that the Department may take in any docket at any time relating to performance metrics. The language is clear. AT&T's contract incorporates by reference only the "the performance standards and remedies approved by the Department in the Consolidated Arbitrations, D.P.U. 96-73/74, 96-75, 96-80/81, 96-83 and 96-94[.]" The intention of the parties was to incorporate the results of a well defined and well understood process in which the parties were then participating. It would be inconsistent with the plain words of the interconnection agreements and with the intentions of the parties as understood from the context in which the original agreements were signed to treat such a provision as an open invitation to change the contract in whatever way and with whatever process the Department may at some future time adopt.

If, contrary to AT&T's position, the Department nevertheless issues an order to eliminate CLEC contract rights, the only way to implement such an order would be through the "change of law" provisions in the interconnection agreements.

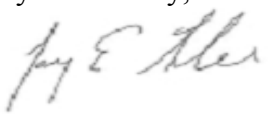
Conclusion

For the reasons stated above and in all of AT&T's previous comments, the Department cannot lawfully eliminate on a generic basis CLEC property interests in their interconnection agreements. If, nevertheless, the Department were to proceed with its proposal, it would need to make an informed decision on the basis of the facts and factors set forth above and in AT&T's previous filings.

Respectfully submitted,

AT&T COMMUNICATIONS OF NEW ENGLAND, INC.

By its attorney,



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